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## *ESSAY*

### PROTECTING SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY

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**I**n *Hollingsworth v. Perry*<sup>1</sup> and *United States v. Windsor*,<sup>2</sup> or perhaps in some more clearly justiciable case a few years hence, the Supreme Court will decide whether states can prohibit same-sex marriages. The Becket Fund for Religious Liberty argued in both pending cases that protecting religious liberty is a rational basis for banning same-sex marriage.<sup>3</sup>

The conflict between religious liberty and gay rights is bad for both sides and dangerous for the American tradition of individual liberty. The Court can protect the rights of both sides.

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<sup>1</sup> *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), cert. granted sub nom., *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012).

<sup>2</sup> *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), cert. granted, *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012).

<sup>3</sup> Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of *Hollingsworth* and the Bipartisan Legal Advisory Group Addressing the Merits at 6-38, *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012) (Nos. 12-144, 12-307).

## I. PROTECTING THE RIGHT TO MARRY

The choice of whom to marry is one of the most intimate and personal decisions that any human being can make. Government should not interfere with that choice without a very important reason. Nor should government leave a substantial class of people, on any realistic view of the matter, with no one to marry. Refusal to permit same-sex civil marriages prima facie violates both the Due Process Clauses and the Equal Protection Clause. At the very least, some form of heightened scrutiny is required.

The Court has long recognized “the right to marry” as a right “of fundamental importance,” a “fundamental freedom,” and “one of the ‘basic civil rights of man.’”<sup>4</sup> It is protected from discrimination, as in *Loving v. Virginia*,<sup>5</sup> and it is part of the liberty protected by the Due Process Clause.<sup>6</sup> Law-abiding gays and lesbians are deprived of a right that the Court has unanimously protected even for incarcerated felons.<sup>7</sup>

The alleged government interests offered in defense of this deprivation do not fit the laws they are claimed to justify. They do not come close. Few if any married couples experience their marriage as exclusively, or even primarily, about procreation. And if the only or principal purpose of state recognition of marriage were to enable children to live with two biological parents, then that policy has manifestly failed. A theoretical government interest, not remotely implemented in practice, cannot be a basis for denying the fundamental right to marry.

Moreover, denying the right to marry does little or nothing to prevent procreation. Same-sex couples raise children resulting from assisted reproduction, from failed attempts to live as heterosexuals, from adoption, and as foster parents. Denying these couples the stability and commitment of civil marriage does nothing to protect any of these children and may on occasion affirmatively harm them.

The claim that children are the reason for marriage does not fit the existing marriage laws, or the social understanding of marriage, or the lived experience of millions of married couples—all of which treat marriage as first and foremost a relationship between two adult spouses. The principal reasons offered to justify the bans on same-sex civil marriage

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<sup>4</sup> *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

<sup>5</sup> *Loving*, 388 U.S. 1.

<sup>6</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>7</sup> *Turner v. Safley*, 482 U.S. 78, 94–100 (1987).

are insufficient to justify such a profound intrusion into the fundamental right to marry.

Nor is religious liberty a sufficient basis for prohibiting same-sex marriage. Significant religious liberty issues will follow in the wake of same-sex civil marriage. But no one can have a right to deprive others of their important liberty as a prophylactic means of protecting his own important liberty. Just as one's right to extend an arm ends where another's nose begins, so each person's claim to liberty in our system must be defined in a way that is consistent with the equal and sometimes conflicting liberty of others. Religious liberty, properly interpreted and enforced, can protect the rights of religious organizations and religious believers to live their own lives in accordance with their faith. But it cannot give them any right or power to deprive others of the corresponding right to live their lives according to their own deepest values.

## II. THE ESSENTIAL PARALLELS BETWEEN THE COMPETING CLAIMS

Same-sex civil marriage would be a great advance for human liberty. But failure to attend to the religious liberty implications could create a whole new set of problems for the liberties of those religious organizations and believers who cannot conscientiously recognize or facilitate such marriages. The net effect for human liberty will be no better than a wash if same-sex couples now oppress religious dissenters in the same way that those dissenters, when they had the power to do so, oppressed same-sex couples. And that is what will happen, unless the Court clearly directs the lower courts to protect religious liberty as well as same-sex civil marriage.

Sexual minorities and religious minorities make essentially parallel claims on the larger society, and the strongest features of the case for same-sex civil marriage make an equally strong case for protecting the religious liberty of dissenters. These parallels have been elaborated by scholars who work principally on religious liberty, and also by scholars who work principally on sexual orientation.<sup>8</sup>

First, both same-sex couples and committed religious believers argue that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when

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<sup>8</sup> See Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claimants Have in Common*, 5 *Nw. J.L. & Soc. Pol'y* 206, 212–26 (2010); William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in America*, 106 *Yale L.J.* 2411, 2416–30 (1997).

manifested in conduct. For same-sex couples, the conduct at issue is to join personal commitment and sexual expression in a multifaceted intimate relationship with the person they love. For religious believers, the conduct at issue is to live and act consistently with the demands made by the Being that they believe made us all and holds the whole world together.

No person who wants to enter a same-sex marriage can change his sexual orientation by any act of will, and no religious believer can change his understanding of divine command by any act of will. Religious beliefs can change over time; far less commonly, sexual orientation can change over time. But these things do not change because government says they must, or because the individual decides they should. Same-sex partners cannot change their sexual orientations, and the religious believer cannot change God's mind.

In finding rights to same-sex civil marriage, state courts have rejected a distinction between sexual orientation and sexual conduct because, they have correctly found, both the orientation and the conduct that follows from that orientation are central to a person's identity. Religious believers also face attempts to dismiss their claims as involving mere conduct, outside the scope of any constitutional right and subject to any and all state regulation. This is the premise of denying judicial review to religiously burdensome laws that are truly generally applicable.<sup>9</sup> But believers cannot fail to act on God's will, and it is no more reasonable for the state to demand that they do so than for the state to demand celibacy of all gays and lesbians. Both religious believers and same-sex couples feel compelled to act on those things constitutive of their identity.

Both same-sex couples and religious dissenters also seek to live out their identities in public. Same-sex couples claim a right beyond private behavior in the bedroom: they claim the right to participate in the social institution of civil marriage. Religious believers likewise claim a right to follow their faith not just in worship services, but also in the charitable services provided through their religious organizations and in their daily lives.

Finally, both same-sex couples and religious dissenters face the problem that what they experience as among the highest virtues is condemned by others as a grave evil. Where same-sex couples see loving commitments of mutual care and support, many religious believers see disordered conduct that violates natural law and scriptural command.

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<sup>9</sup> *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990).

And where those religious believers see obedience to a loving God who undoubtedly knows best when He lays down rules for human conduct, many supporters of gay rights see intolerance, bigotry, and hate. Because gays and lesbians, and religious conservatives, are each viewed as evil by a substantial portion of the population, each is subject to substantial risks of intolerant and unjustifiably burdensome regulation.

There is no reason to let either side oppress the other. Same-sex couples should not be denied the right to civil marriage. And the state should not force dissenting religious organizations to recognize or facilitate same-sex marriages.

### III. PROTECTING RELIGIOUS LIBERTY

#### *A. Displacing Legislative Protection.*

All six jurisdictions that enacted same-sex civil marriage legislatively also enacted religious liberty protections for religious organizations that do not recognize same-sex marriages.<sup>10</sup> Pending bills for same-sex civil marriage in Hawaii, Illinois, and Rhode Island all contain religious liberty protections.<sup>11</sup> In the four states that recognized same-sex marriage judicially, by constitutional interpretation, the situation is very different. There is reasonably robust statutory protection, like that enacted in most of the states that enacted same-sex marriage by legislation, only in Connecticut.<sup>12</sup>

The reason is clear. When a legislature considers same-sex civil marriage legislation, there are supporters and opponents and undecided legislators. In the democratic bargaining of the legislative process, bills emerge that protect same-sex civil marriage *and* religious liberty. The religious liberty provisions are sometimes inserted or redrafted at the last minute. They are sometimes poorly drafted, incomplete, and ambiguous. Most of them are far from ideal. But most of them at least attempt to provide meaningful protection for the liberty of religious organizations.

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<sup>10</sup> D.C. Code § 46-406 (Supp. 2012); Me. Rev. Stat. Ann. tit. 19-A, § 655.3 (West, WESTLAW through 2012 legislation); Md. Code Ann., Fam. Law § 2-201 Ed. note (LexisNexis 2012); N.H. Rev. Stat. Ann. § 457:37 (LexisNexis Supp. 2012); N.Y. Dom. Rel. Law §§ 10-b, 11 (Consol. Supp. 2013); Vt. Stat. Ann. tit. 8, § 4501(b) (Supp. 2012), tit. 18 § 5144(b) (2012); Wash. Rev. Code §§ 26.04.010, 26.04.900 (2012).

<sup>11</sup> See H.B. 1109, 27th Leg., Reg. Sess. § 2 (Haw. 2013); S.B. 1369, 27th Leg., Reg. Sess. § 2 (Haw. 2013); S.B. 10, 98th Leg., Reg. Sess. §§ 15, 905 (Ill. 2013); H.B. 5015, 2013 Gen. Assemb., Jan. Sess. § 4 (R.I. 2013).

<sup>12</sup> Conn. Gen. Stat. §§ 46b-22b, 46b-35a, 46b-35b (2013).

This bargaining process can break down when there is lopsided support for same-sex civil marriage. And it entirely breaks down when same-sex civil marriage becomes the law through a judicial decision on constitutional grounds. Those who would add religious liberty protections to a civil marriage bill are deprived of a vehicle and deprived of bargaining power. The result is that the legislature often does not attend to the specific issues of religious liberty raised by same-sex civil marriage.

The lesson is clear. If the Court constitutionalizes same-sex civil marriage for the country, it must attend to the resulting issues of religious liberty. Such a decision would make it far more difficult for legislatures to attend to those issues.

### *B. Civil Marriage and Religious Marriage*

The religious disagreement over marriage equality begins with a disagreement over the nature of marriage. Marriage is both a legal relationship and a religious relationship.<sup>13</sup> Advocates of marriage equality tend to see the legal relationship as primary; most opponents see the religious relationship as primary. Of course, it is possible to distinguish the two relationships, but in our law and especially in our culture, they are deeply intertwined. If the Court invalidates discriminatory definitions of civil marriage, it must take pains not to interfere with the right of religious organizations to define religious marriage.

Civil marriage—the legal relationship—defines property rights, mutual duties of support, inheritance rights, pension rights, insurance coverage, social security benefits, tax liabilities, evidentiary privileges, rights to sue for personal injury or file for bankruptcy, and much more. Equality with respect to these important consequences of civil marriage—mostly financial consequences—is of course part of the reason that civil marriage equality is so important.

The religious relationship is overlapping but very different. Marriage is a sacrament in the Catholic faith and an important religious commitment in most other faiths. Marriage is ordained in both the Jewish and Christian scriptures.

Sex and sexual morality are central to religious marriage but increasingly peripheral to legal provisions for civil marriage. Consensual sex

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<sup>13</sup> See Douglas Laycock, Afterword, *in* Same-Sex Marriage and Religious Liberty: Emerging Conflicts 189, 202–03 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson eds., 2008) [hereinafter Same-Sex Marriage].

has been deregulated, both in and out of marriage. Adultery and fornication are no longer crimes, and alienation of affections is no longer a tort. It is entirely possible, though presumably rare, to have a fully valid legal marriage without sex. Understandings about sex in a civil marriage are left to the married couple, and appropriately so.

The state, or the Court as a matter of constitutional interpretation, can change the legal definition of civil marriage. But neither the state nor the Court can change the religious definition of religious marriage. Some religious organizations will refuse to recognize same-sex marriages because, for them, marriage is a religious relationship at its foundation, and a same-sex marriage is religiously invalid or impossible.

It is this issue of religious recognition of same-sex civil marriages that gives rise to novel issues of religious liberty. Once same-sex couples are civilly married, the existing discrimination laws suddenly apply to a relationship of profound religious significance, demanding that religious organizations and believers recognize a relationship that they believe to be inherently religious.

Every court that has held marriage discrimination unconstitutional has carefully explained that it is changing only civil marriage and not religious marriage. That explanation is important, but it has done little to assuage religious objections. In part this is because the culture often fails to make the distinction. And in part it is because those who oppose same-sex marriage on religious grounds understand civil marriage to rest on the foundation of religious marriage. On this view, a civil marriage that departs too radically from the foundation of religious marriage is simply not a marriage. To treat it as though it were a marriage, for many religious organizations and believers, is to violate fundamental religious commitments. And when the inevitable lawsuits come, those charging religious organizations with discrimination will also be conflating civil marriage and religious marriage.

It is essential that the Court distinguish the two relationships, and that it commit itself to protecting the right to maintain religious understandings of the religious relationship.

### *C. Specific Religious Liberty Issues*

Both as organizations and as individuals, those committed to traditional understandings of religious marriage may refuse to recognize, assist, or facilitate same-sex marriages. Of course this means not performing the wedding ceremony or hosting the wedding reception. But it means much more than that.

Must rabbis, priests, and pastors provide religious marriage counseling to same-sex couples?<sup>14</sup> Must religious colleges provide married student housing to same-sex couples?<sup>15</sup> Must churches and synagogues employ spouses in same-sex marriages, even though such employees would be persistently and publicly flouting the religious teachings they would be hired to promote? Must religious organizations provide spousal fringe benefits to the same-sex spouses of any such employees they do hire? Must religious social service agencies place children for adoption with same-sex couples? Already, Catholic Charities in Illinois, Massachusetts, and the District of Columbia has closed its adoption units because of this issue.<sup>16</sup>

Religious colleges, summer camps, day care centers, retreat houses, counseling centers, meeting halls, and adoption agencies may be sued under public accommodations laws for refusing to offer their facilities or services to same-sex couples. Or they may be penalized by loss of licensing, accreditation, tax exemption, government contracts, or access to public facilities.<sup>17</sup>

There will also be disputes about individuals who provide creative and personal services that directly assist or facilitate marriages. Must a wedding planner or a wedding photographer plan or photograph a same-sex wedding, even though she thinks the ceremony makes a mockery of the religious institution of marriage?<sup>18</sup> Must a counselor in private practice counsel same-sex couples about their relationship difficulties, even though he thinks their relationship is religiously prohibited or intrinsically disordered? Of course, no same-sex couple would ever want to be counseled by such a counselor. Demanding a commitment to counsel same-sex couples does not obtain counseling for those couples, but it does threaten to drive from the helping professions all those who adhere to older religious understandings of marriage.

These religious liberty disputes can arise across a wide range of factual circumstances. But they involve a discrete and bounded set of po-

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<sup>14</sup> Cf. *Ward v. Polite*, 667 F.3d 727, 730–32 (6th Cir. 2012) (involving a counseling student who was expelled from graduate school for refusing to counsel with respect to a same-sex relationship).

<sup>15</sup> See *Levin v. Yeshiva Univ.*, 754 N.E.2d 1099, 1101 (N.Y. 2001).

<sup>16</sup> Laurie Goodstein, *Illinois Bishops Drop Program over Bias Rule*, N.Y. Times, Dec. 29, 2011, at A16.

<sup>17</sup> See generally Marc D. Stern, *Same-Sex Marriage and the Churches*, in *Same-Sex Marriage*, supra note 13, at 1–57.

<sup>18</sup> See *Elane Photography, LLC v. Willock*, 284 P.3d 428 (N.M. Ct. App.), cert. granted sub nom, *Elane Photography v. Willock*, 296 P.3d 491 (N.M. 2012).



tential claimants: churches, synagogues, and other places of worship, not-for-profit organizations with strong religious commitments, and individuals in a few occupations offering personal services closely connected to marriage.

Doctrinal tools are available to address these conflicts. Recognition of marriage within a religious organization is often an internal matter, protected by the right to make “an internal church decision that affects the faith and mission of the church itself.”<sup>19</sup> Religious decisions that cannot be characterized as internal may nonetheless be protected by then-Judge Alito’s interpretation of *Employment Division v. Smith*,<sup>20</sup> which quite reasonably concludes that where a law has secular exceptions that undermine its policy goals, *Smith* requires that the law also have religious exceptions or a compelling reason why not.<sup>21</sup> In an appropriate future case, the Court should be open to reconsidering *Smith*’s rule that if a law has no secular exceptions, it can be applied to suppress religious practices without justification or judicial inquiry. Finally, the Court should clearly indicate that it does not mean to preclude state-law protections for religious liberty in this context.

Whether or not *Smith* is reconsidered, there are important tools available to protect religious liberty within *Smith* itself, in the doctrine of *Hosanna-Tabor*,<sup>22</sup> in statutes, and in state constitutions. The Court should protect the right to marry, use these tools to protect religious liberty with respect to marriage, and make clear that state courts are free to use state law to the same end.

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<sup>19</sup> *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012).

<sup>20</sup> 494 U.S. 872 (1990).

<sup>21</sup> *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.).

<sup>22</sup> 132 S. Ct. at 705–07, 710 (holding that church’s right to make internal decisions affecting faith and mission precludes “an employment discrimination suit brought on behalf of a minister, challenging her church’s decision to fire her”).